Alamgir v Cass Printing & Packaging Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCvC-1150–09 OF 2012
YEOH WEE SIAM J
27 JANUARY 2014

Tort — Negligence — Accident at work — Action against employer — Employee's hands caught between rollers of printing machine — Employee's right arm amputated from shoulder — Whether employer provided safe working condition — Whether employer provided proper training to operate and/or repair machines — Whether there was failure to repair auto stop switches in machine — Removal of safety grill — Whether done by employer/employee — Whether employer negligent — Whether there was contributory negligence by employee — Employee foreign worker from Bangladesh — Whether employee governed by Workmen's Compensation Act 1952 — Whether law on compensation or damages applicable

The plaintiff, a national of Bangladesh, was employed as a printing machine operator at the defendant's factory. The plaintiff was working on a night shift at the printing machine when his right hand was caught between the rollers of the machine. As a result, the plaintiff suffered an injury which later resulted in the amputation of his right arm from the shoulder. The plaintiff's claimed for the tort of negligence against the defendant, as the employer, as it was submitted that the defendant failed to ensure that the machinery in the factory was in safe working condition; failed to ensure that proper training was provided to operate and/or repair the machines; failed to repair the auto stop switches in the machine. The plaintiff also contended that the defendant had removed the safety grill or grill cover from the printing machine that the plaintiff was working on, and despite the plaintiff's repeated requests to replace the grill cover and to repair the auto stop switch, the defendant had failed to do so. The defendant's defence was that it was the plaintiff who had removed the grill cover and that the plaintiff was working in an area of the machine that was unsafe and therefore the resulting injury was brought on by himself. The issues that arose for the court's determination were whether the defendant was negligent; whether there was contributory negligence by the plaintiff; and whether the plaintiff should be governed by the Workmen's Compensation Act 1952 ('the WC Act') or whether the plaintiff could file these proceedings in the court, and if the law on compensation or damages would be applicable in this case.

Held, allowing the claim:

(1) There was no evidence that the plaintiff himself had removed the grill cover. It was not probable that the plaintiff would remove the grill cover considering that he had made repeated requests to the defendant to fix the grill cover. It was more probable that the grill cover was not fixed onto the machine. That is why the accident happened and the plaintiff was injured. If the grill cover had been fixed as required, the accident would not have happened. The defendant was negligent when it breached its duty of care in not ensuring that, at all times, the grill cover was fixed onto the machine when the plaintiff was working (see paras 20 & 27).

(2) Since the plaintiff was an experienced printing machine operator, and he was employed by the defendant based on his experience, there was no negligence on the defendant's part in not providing the plaintiff with proper training to work on the defendant's printing machine (see para 25).

(3) The plaintiff's accident happened at the back of the machine ie at the middle portion ('the middle portion'). According to the defendant's witnesses, the correct way to clean the paper dust off the machine should be at the front portion of the machine, and not at the middle portion which the plaintiff did. The plaintiff, in view of his experience, ought to know that for his own safety, he should be cleaning the rollers at the front portion of the machine rather than at the middle portion, more so when he could see for himself that the grill cover was lifted and not in place. It was highly improbable for the defendant to instruct the plaintiff to work at the middle portion of the machine just because he wanted the printing to be of good quality. The plaintiff had partly by his own fault in cleaning the rollers at the wrong portion of the machine contributed to the accident. He should be made 50% liable for contributory negligence (see paras 32 & 34).

(4) The plaintiff did not fall within proviso (a) to s 2(1) of the WC Act which excludes coverage of non-manual workers earning more than RM500 a month, but instead was employed by the defendant by way of manual labour under the substantive provision of s 2(1) of the same Act, and earning more than RM500 a month. Accordingly, the plaintiff is governed by the WC Act. The defendant, as employer, was therefore caught in an ambiguous situation in the interim period until the plaintiff's work permit is approved by the government. Had the defendant insured himself under s 26(1) or (2) of the WC Act, then his liability to the plaintiff would have been governed by such insurance policy and the WC Act. Knowing that the plaintiff could not be insured pending the approval of his work permit, the defendant took a risk in employing the plaintiff. In the absence of any insurance coverage for the plaintiff as a workman, the defendant is liable for damages for the plaintiff's personal injury (see paras 42–46).

[Bahasa Malaysia summary

Plaintif, seorang rakyat Bangladesh, bekerja sebagai operator mesin cetak di kilang defendan. Plaintif bekerja pada syif malam di mesin cetak apabila tangan kanannya terperangkap di antara penggelek mesin. Akibatnya, plaintif mengalami kecederaan yang kemudian mengakibatkan pemotongan lengan kanannya dari bahu. Plaintif mendakwa untuk tort kecuaian terhadap defendan, sebagai majikan, kerana adalah telah dikemukakan bahawa defendan gagal untuk memastikan bahawa jentera di kilang berada dalam keadaan kerja yang selamat; gagal untuk memastikan bahawa latihan yang sewajarnya diberikan untuk mengendalikan dan/atau membaiki mesin; gagal membaiki suis berhenti automatik di dalam mesin. Plaintif juga mendakwa bahawa defendan telah membuka gril keselamatan atau penutup gril dari mesin pencetak yang sedang dikendalikan oleh plaintif, dan walaupun atas permintaan berulang plaintif untuk menggantikan penutup gril dan membaiki suis berhenti automatik, defendan gagal berbuat demikian. Pembelaan defendan adalah bahawa ia adalah plaintif yang telah membuka penutup gril dan bahawa plaintif telah bekerja di dalam suatu kawasan mesin yang tidak selamat dan dengan itu menyebabkan kecederaan disebabkan oleh dirinya sendiri. Isu-isu yang timbul untuk penentuan mahkamah adalah sama ada defendan cuai; sama ada terdapat kecuaian sertaan oleh plaintif; dan sama ada plaintif tertakluk kepada Akta Pampasan Pekerja 1952 ('Akta WC') atau sama ada plaintif boleh memfailkan prosiding ini di mahkamah, dan jika undang-undang mengenai pampasan atau ganti rugi terpakai dalam kes ini.

Diputuskan, membenarkan tuntutan:

(1) Tidak ada bukti bahawa plaintif sendiri telah mengalihkan penutup gril. Adalah tidak mungkin bahawa plaintif akan mengalihkan penutup gril mempertimbangkan bahawa dia telah membuat permintaan yang berulang kepada defendan untuk membaiki penutup gril. Ia adalah lebih berkemungkinan bahawa penutup gril tidak dipasangkan di mesin. Itulah sebabnya kemalangan itu berlaku dan plaintif telah cedera. Jika penutup gril telah dipasangkan seperti yang dikehendaki, kemalangan tidak akan berlaku. Defendan cuai apabila ia melanggar kewajipan berjaga-jaga dalam tidak memastikan bahawa, pada setiap masa, penutup gril dipasangkan di mesin apabila plaintif bekerja (lihat perenggan 20 & 27).

(2) Oleh kerana plaintif adalah seorang pengendali mesin pencetak yang berpengalaman, dan dia telah digajikan oleh defendan berdasarkan pengalamannya, tidak ada kecuaian di pihak defendan dalam tidak menyediakan plaintif dengan latihan yang sewajarnya untuk mengendalikan mesin pencetak defendan (lihat perenggan 25).

(3) Kemalangan plaintif itu berlaku di belakang mesin iaitu di bahagian tengah ('bahagian tengah'). Menurut saksi defendan, cara yang betul

untuk membersihkan habuk kertas daripada mesin sepatutnya di bahagian depan mesin, dan bukan di bahagian tengah yang mana dikendalikan oleh plaintif. Plaintif, mempertimbangkan pengalamannya, patut tahu bahawa untuk keselamatan sendiri, dia perlu membersihkan penggelek di bahagian depan mesin dan bukan di bahagian tengah, lebih-lebih lagi apabila dia dapat melihat sendiri bahawa penutup gril telah dialihkan dan tidak di tempatnya. Ia adalah sangat tidak mungkin untuk defendan mengarahkan plaintif untuk mengendalikan di bahagian tengah mesin hanya kerana dia mahu percetakan untuk menjadi kualiti yang baik. Plaintif telah sebahagiannya atas kesalahan dirinya sendiri dalam membersihkan penggelek di bahagian yang salah di mesin menyumbang kepada kemalangan. Dia sepatutnya dikenakan 50% bertanggungan untuk kecuaian sertaan (lihat perenggan 32 & 34).

(4) Plaintif tidak termasuk dalam proviso (a) kepada s 2(1) Akta WC yang mana tidak memasukkan liputan pekerja bukan manual berpendapatan lebih daripada RM500 sebulan, tetapi sebaliknya telah digajikan oleh defendan melalui buruh kasar di bawah peruntukan substantif s 2(1) Akta yang sama, dan berpendapatan lebih daripada RM500 sebulan. Oleh itu, plaintif adalah tertakluk oleh Akta WC. Defendan, sebagai majikan, oleh itu berada dalam keadaan samar-samar dalam tempoh interim sehingga permit kerja plaintif diluluskan oleh kerajaan. Sekiranya defendan menginsuranskan dirinya di bawah s 26(1) atau (2) Akta WC, maka liabiliti kepada plaintif tertakluk oleh polisi insurans dan Akta WC. Mengetahui bahawa plaintif tidak boleh diinsuranskan sementara menunggu kelulusan permit kerja, defendan mengambil risiko dalam menggajikan plaintif. Dalam ketiadaan apa-apa perlindungan insurans bagi plaintif sebagai seorang pekerja, defendan adalah bertanggungan untuk ganti rugi bagi kecederaan diri plaintif (lihat perenggan 42–46).]

Notes

For cases on accident at work, see 12(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 944–1005.

Cases referred to

Tai Siat Fah & Ors v Lawful Personal Representative of Badrul Hisham bin Hashim [1995] 2 MLJ 571; [1995] 2 CLJ 649, HC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3A), 12(1), 28A, 28A(1)(a), 28A(2)(d)(i)
Evidence Act 1950 ss 102, 103, 114(g)
Factories and Machineries Act 1967
Occupational Safety and Health Act 1994 s 15

Workmen's Compensation Act 1952 ss 2(1), 8, 9, 26, First Schedule

S Surendran (Fatin Irena with him) (Palani Aishah & Co) for the plaintiff.
Danny Ng Yeong Chong (T S Liew Nurzila & Co) for the defendant.

Yeoh Wee Siam J:

THE PLAINTIFF'S CLAIM

[1] The plaintiff's claim in the writ of summons (encl 1) and amended statement of claim ('amended SOC') (encl 5) is made under s 28A of the Civil Law Act 1956 ('the CLA') for, inter alia, general damages, special damages, interests and costs arising out of the plaintiff's personal injury suffered during an accident caused by the alleged negligence of the defendant.

BRIEF FACTS

[2] The plaintiff, a national of Bangladesh, was employed as a factory worker ie as a printing machine operator at the defendant's printing factory from the month of June 2011 till the time when the accident occurred on 8 December 2011.

[3] The plaintiff was not a foreign worker brought into work in Malaysia by the defendant. The plaintiff was already in Malaysia working in another printing factory prior to his employment with the defendant. The plaintiff came to the defendant's premises sometime in June 2011 asking for a job. He was met by the Executive Director of the defendant, Beh Wei Chun (DW3).

[4] At that point of time, the Government of Malaysia ('the government'), through its initiative to legalise foreign workers working in Malaysia without a valid working permit, had introduced the 6P Program. Under this Program, foreign workers, without a valid working permit (*Pekerja Asing Tanpa Izin* ('PATI')) but who have submitted an application for a working permit, are allowed to work under the named employer until further instruction from the government.

[5] DW3 decided to employ the plaintiff and had engaged the service of a foreign worker agency, IMI Services Sdn Bhd, to make an application to the government, on behalf of the defendant, to have the plaintiff registered under the 6P Program.

[6] IMI Services Sdn Bhd proceeded to make the 6P Program application for the plaintiff. During this time, the plaintiff was already working at the defendant's printing factory.

[7] On 8 December 2011, the plaintiff was working on a night shift together with another co-worker at the printing machine, known as the Heidelberg Sorsz ('the printing machine' or 'the machine'), when his right hand was caught between the rollers of the machine. As a result of this industrial accident ('the accident'), the plaintiff suffered an injury which later resulted in the amputation of his right arm from the shoulder.

[8] The plaintiff's claim is that the defendant, as the employer, was negligent because the defendant:

(a) failed to ensure that the machinery in the defendant's factory was in safe working condition;

(b) failed to ensure that proper training was provided to operate and/or repair the machines; and

(c) failed to repair the auto stop switches in the machine ('the auto stop switch') that the plaintiff was working on.

[9] The crux of the plaintiff's case is that the defendant had removed the safety grill or grill cover ('the grill cover') from the printing machine that the plaintiff was working on, and despite the plaintiff's repeated requests to replace the grill cover and to repair the auto stop switch, the defendant had failed to do so.

[10] The defendant's defence is that it was the plaintiff who had removed the grill cover and that the plaintiff was working in an area of the machine that was unsafe and therefore the resulting injury was brought on by himself.

ISSUES

[11] The main issues are:

(a) whether the defendant was negligent;

(b) whether there was contributory negligence by the plaintiff;

(c) whether the plaintiff should be governed by the Workmen's Compensation Act 1952 ('the WC Act') or whether the plaintiff can file these proceedings in court, and the law on compensation or damages applicable in this case.

(1) Whether the defendant was negligent

[12] As provided in s 102 and s 103 of the Evidence Act 1950, the burden of proof is on the Plaintiff to prove the defendant's negligence as alleged.

[13] The plaintiff himself ('PW1') was his only witness. He testified that from the start of his work, the printing machine had no grill cover and the auto stop switch was not working. He had raised this issue before with the defendant but the defendant did not install the grill cover and the auto stop switch was still not working. That was why, while working on the machine, the plaintiff's hand got caught in the machine resulting in his arm being crushed and had to be amputated.

[14] The question is whether the grill cover was installed and in place at the machine, and the auto stop switch was in good working condition, when the accident happened to the plaintiff.

[15] The only evidence adduced by the plaintiff of the defendant's negligence is his own oral evidence.

[16] However, the defendant's own witness, Lim Min Long ('DW1'), the supplier of the printing machine to the defendant, under cross-examination, testified that soon after the accident, when his engineer was asked to check the machine, the engineer found that the grill cover was not on the machine, but it had been taken off. In DW1's own words:

> My Engineers, that time Mr. Tan he told me that the grill is not fixing on the machine ...
>
> That means the whole grill was not with the machine ...
>
> That means that they had already taken out. Once the grill is taken out the safety switch is free and it can be run.

[17] In re-examination, DW1, further stated that after the incident, the grill cover was found somewhere in the factory, and his engineer, Tan Chai Eng ('Tan'), fixed it back onto the machine.

[18] Tan was not called as a witness by the plaintiff and the defendant. From DW1's testimony, the court finds that on the instructions of DW1, Tan had gone to check the machine immediately after the accident. Even without Tan's evidence, the court accepts DW1's evidence since DW1 was Tan's employer and Tan had informed DW1 that the grill cover was not on the machine when he went to check the machine.

[19] According to DW1, the removal of the grill cover is a complicated process and it is done by DW1's engineers. There is no evidence that the plaintiff himself had removed the grill cover. It is not probable that the plaintiff would remove the grill cover considering that he had made repeated requests to the defendant to fix the grill cover.

[20] Counsel for the defendant submitted that the defendant had nothing to benefit from removing the grill cover. I am of the view that, similarly, the plaintiff had nothing to gain from removing the grill cover. From the evidence of the plaintiff and DW1, the curt finds that it is more probable that the grill cover was not fixed onto the machine. That is why the accident happened and the plaintiff was injured. If the grill cover had been fixed as required, the accident would not have happened.

[21] The plaintiff did not call his co-worker, who was then working with him, as a witness, to support his evidence. This is because the plaintiff's co-worker is a foreign worker and cannot now be traced. In view of this reasonable excuse, the court does not think that the adverse inference in s 114(g) of the Evidence Act 1950 should be invoked against the plaintiff.

[22] Even without the co-worker's evidence, the plaintiff is able to have benefit of DW1's evidence which support the plaintiff's allegation that the grill cover was not fixed onto the machine. According to DW1, the accident was caused by the grill cover being taken out, and not because the auto stop switch was faulty.

[23] Heng Bak Hin ('DW2'), the plaintiff's supervisor at the printing factory for quality control of printed material, informed the court that the machine could not stop automatically when the plaintiff's hand got caught between the rollers because when the grill cover was lifted, the auto stop switch could not work.

[24] Regarding training, the court finds that the defendant did not provide training to the plaintiff on how to operate the machine. This is because, according to DW3, when the plaintiff first approached him asking to be employed, the plaintiff was already experienced in working with printing machines. In fact, the plaintiff was employed in his previous job to operate printing machines. DW3 stated that from the commencement of his employment, the plaintiff was able to operate the defendant's machine on his own.

[25] The court is of the view that since the plaintiff is an experienced printing machine operator, and he was employed by the defendant based on his experience, there is no negligence on the defendant's part in not providing the plaintiff with proper training to work on the defendant's printing machine.

[26] It is to be noted that DW3 admitted that the defendant did not report the accident as required under the Factories and Machineries Act 1967. It was the plaintiff himself who reported the accident to the Department of Safety and Health. The question arises as to why the defendant, as the employer of the

plaintiff, failed to report the accident as required by law. Had the defendant reported the accident, proper investigations would have been conducted by the relevant authorities on the matter. Furthermore, under s 15 of the Occupational Safety and Health Act 1994: 'It shall be the duty of every employer and self-employed person to ensure, so far as is practicable, the safety, health and welfare of all his employees.'

[27] From the totality of the evidence adduced, on a balance of probabilities, the court is satisfied that the defendant was negligent when it breached its duty of care in not ensuring that, at all times, the grill cover was fixed onto the machine when the plaintiff was working. The plaintiff was injured in the accident as a result of the defendant's breach of duty of care.

Whether there was contributory negligence by the plaintiff

[28] The plaintiff's accident happened at the back of the machine ie at the middle portion ('the middle portion'). According to DW1 and DW2, the correct way to clean the paper dust off the machine should be at the front portion of the machine, and not at the middle portion which the plaintiff did. DW1, under cross-examination, stated that the reason why machine operators clean paper dust off the roller at the middle portion of the printing machine is because they are lazy and it is convenient for them.

[29] The plaintiff testified that he was instructed by his supervisor to clean the rollers at the centre portion to prevent wastage of paper and ink. However, this evidence was rebutted by DW1 and DW2 who stated that there would be not much difference in terms of wastage whether machine was cleaned at the front portion or the middle portion of the machine.

[30] DW2, as the plaintiff's supervisor, testified, inter alia:

(a) that the rollers must not be cleaned at the middle portion of the machine because the machine will not stop even if there is something caught in between the rollers. The back of the machine, ie at the middle portion, is equipped with a grill cover for the safety of the machine operator and if this grill cover is lifted, the machine could not be switched on. If the grill cover is lifted whilst the machine is running, it will stop automatically.

(b) the machine operator will not be able to switch on the machine with the grill cover lifted unless the two holes on the machine which are to be filled by part of the grill cover, are stuffed with other items, creating a false indication that the grill cover has been lowered down ie fixed onto the machine.

(c) the back part of the grill cover can be lifted for the purposes of taking out the rollers for washing after finishing printing.

(d) the printing machine has three auto off switches and a safety bar at the roller to avoid accident.

(e) after the accident, he discovered that the two holes on the plaintiff's printing machine were stuffed with paper.

(f) DW2 is of the view that the accident would not have occurred if the grill cover was not lifted and that the rollers were cleaned from the front part of the machine.

(g) DW2 confirmed that the printing machines owned by the defendant are without modifications.

(h) DW2 personally had seen the plaintiff lifting the grill cover while printing was ongoing on several occasions and had warned him of the danger.

[31] The defendant did not adduce any evidence of DW2 or any other employee of the defendant who, at the material time, had seen the plaintiff lifting the grill cover, or removing it from the machine, to make his job easier, or that he had stuffed paper into the two holes on the machine to enable the machine to continue to run even if the grill cover is lifted or removed from the machine.

[32] As for working at the wrong portion of the machine to clean the rollers ie at the middle portion, it is highly probable that despite DW2's oral warnings, the plaintiff continued to work at the middle portion since it was easier to do the cleaning. The plaintiff is an experienced printing machine operator. DW2 was only his supervisor for controlling the quality of the printed material, that the printing is clean and good. However, as DW2 stated, DW2 was not the plaintiff's supervisor for safety aspects. The plaintiff, in view of his experience, ought to know that for his own safety, he should be cleaning the rollers at the front portion of the machine rather than at the middle portion, more so when he could see for himself that the grill cover was lifted and not in place and yet because the holes were stuffed with paper, the machine could still run and it would be dangerous and to his detriment if he were to work at that middle portion of the machine. The plaintiff should have heeded DW2's previous oral warnings for his own good. It is highly improbable for DW2 to instruct the plaintiff to work at the middle portion of the machine just because he wanted the printing to be of good quality.

[33] Section 12(1) and (6) of the CLA provide as follows:

Apportionment of liability in case of contributory negligence

> 12 (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage;
>
> (6) In this section 'fault' means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

[34] The court finds that the plaintiff had partly by his own fault in cleaning the rollers at the wrong portion of the machine, ie at the middle portion, contributed to the accident. He should be made 50% liable for contributory negligence.

Whether the plaintiff should be governed by the WC Act or whether the plaintiff can file these proceedings in court, and the law on compensation or damages applicable in this case

[35] The question is whether the plaintiff is a 'workman' within the meaning of the WC Act.

[36] The meaning of 'workman' is given in s 2(1) and proviso (a) thereto of the WC Act as follows:

> 2 (1) In this Act, unless the context otherwise requires, the expression 'workman', subject to the proviso to this subsection, means any person who has, either before or after the commencement of this Act, entered into or works under a contract of service or of apprenticeship with an employer, whether by way of manual labour or otherwise, whether the contract is expressed or implied or is oral or in writing, whether the remuneration is calculated by time or by work done and whether by the day, week, month or any longer period:
>
> Provided that the following persons are excepted from the definition of 'workman' —
>
> (a) Any person employed otherwise than by way of manual labour whose earnings, calculated in accordance with section 9, exceed five hundred ringgit a month.

[37] In the plaintiff's PATI registration slip under the 6P Program (CBOD Part B p 23), the plaintiff was registered under the manufacturing sector (*perkilangan*).

[38] In the plaintiff's specialist report dated 14 August 2012 prepared by Dr Chee Chia Shing of Teo Orthopaedic Clinic Sdn Bhd (CBOD Part A pp 11

and 12), the plaintiff had informed his specialist doctor that he was a factory worker at the material time of the accident.

[39] The defendant, through the evidence of Cindy Mak Kah Wai (DW4), had adduced evidence that the plaintiff was registered as a general worker under the factory sector (*perkilangan*).

[40] The term 'manual labour' has not been defined in the WC Act.

[41] According to the *Concise Oxford Dictionary*, (9th Ed), Thumb Index Ed, the word 'manual" means 'of or done with the hands', whilst the word 'labour' means 'physical or mental work; exertion; toil'.

[42] Applying the above *Oxford Dictionary* meanings, the court is of the opinion that the plaintiff does not fall within proviso (a) to s 2(1) of the WC Act which excludes coverage of non-manual workers earning more than RM500 a month, but instead was employed by the defendant by way of manual labour under the substantive provision of s 2(1) of the same Act, and earning more than RM500 a month. Accordingly, the plaintiff is governed by the WC Act.

[43] However, according to DW3, until the plaintiff's work permit under the 6p program was approved by the government, the defendant could not purchase an insurance policy for the plaintiff. This was confirmed by DW4, the foreign worker agent.

[44] It is to be noted that s 26 of the WC Act makes it mandatory for the employer to insure the plaintiff as his workmen. Section 26(1) and (2) of the Act provide as follows:

> Compulsory insurance by employer
>
> 26 (1) Every employer shall insure and keep himself insured with an insurer within the meaning of the Insurance Act 1963 [Act 89] in respect of any liability which he may incur under this Act to every workman employed by him.
>
> (2) Notwithstanding subsection (1) the Minister may by order approve an insurance scheme, and upon the coming into force of the order, every employer shall insure and keep himself insured under the approved insurance scheme in respect of any liability which he may incur under this Act to every workman employed by him.

[45] The defendant, as employer, was therefore caught in an ambiguous situation in the interim period until the plaintiff's work permit is approved by the government. Had the defendant insured himself under s 26(1) or (2) of the WC Act, then his liability to the plaintiff would have been governed by such insurance policy and the WC Act.

[46] In the absence of any such insurance, the plaintiff is therefore not precluded from filing this claim under s 28A of the CLA. In fact, even if the plaintiff had been insured by the defendant, the plaintiff is also not precluded from making this civil claim. This is allowed under s 28A(1)(a) of the CLA which provides:

> Damages in respect of personal injury
>
> 28A (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account —
>
> (a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act.

[47] Knowing that the plaintiff could not be insured pending the approval of his work permit, the defendant took a risk in employing the plaintiff. In the absence of any insurance coverage for the plaintiff as a workman, the defendant is liable for damages for the plaintiff's personal injury (see also the decision of Dato Abdul Malik bin Hj Ishak J (as he then was) in *Tai Siat Fah & Ors v Lawful Personal Representative of Badrul Hisham bin Hashim* [1995] 2 MLJ 571; [1995] 2 CLJ 649 where it was held, inter alia, that compensation under the WC Act will not bar a dependancy claim under s 7 of the CLA in respect of loss of support and damages for bereavement under s 7(3A) of the CLA, nor will such compensation be said to be deductible).

[48] However, in determining the quantum of damages to be awarded, this court, while not being bound by the provisions of the WC Act ('the Act') on compensation, in particular s 8 and s 9 of the WC which are relied upon by the defendant, has the discretion to consider the principles contained in the provisions of the Act, as a guide, since the Act applies to plaintiff as a workman. This is for the reason that the Act would have applied to him had the defendant insured him, in which case s 8 and s 9 of the Act would have applied.

AWARD ON DAMAGES

[49] In view of the earlier finding by this court that the plaintiff is liable for negligence, the damages to be awarded are to be calculated as follows:

Whether compensation under the WC Act should prevail

[50] Regarding the amount of compensation under the WC Act, the Defendant submitted as follows:

Section 8(b) and (c) of the WC provides:

> Amount of compensation
>
> 8 Subject to this Act the amount of compensation shall be as follows, namely —
>
> (a) ...
>
> (b) where permanent total disablement results from the injury —
>
> (i) in the case of an adult who has completed the eighteenth year of his age, a lump sum equal to sixty months earnings or twenty-three thousand ringgit, whichever is the less;
>
> (ii) in the case of any other adult, a lump sum equal to eighty-four months earnings or twenty-three thousand ringgit, whichever is the less; and
>
> (c) where permanent partial disablement results from the injury such percentage of the compensation which would have been payable in the case of permanent total disablement as is proportionate to the permanent loss of earning capacity caused by the injury:
>
> Provided that in the case of an injury specified in the First Schedule the compensation payable shall not be less than such percentage of the compensation which is payable in the case of permanent total disablement as is set opposite to that injury in the said Schedule:.

Part II of the First Schedule to the WC Act for 'LIST OF INJURIES DEEMED TO RESULT IN PERMANENT PARTIAL DISABLEMENT' under Serial No. 2 states that for 'Amputation below shoulder with stump less than 8' from tip of acromion' the 'Percentage of loss of earning capacity is 80%'.

[51] The plaintiff's specialist report stated that the plaintiff had suffered amputation of the right upper limb at the level of proximal third of right humerus.

[52] The defendant submitted that the plaintiff is only entitled to compensation under the WC Act as follows:

RM23,000.00 x 80% = RM18,400.00.

[53] I have considered the provisions of the WC Act as a guide for this court to determine the amount of compensation to be paid to the plaintiff. However, the court notes that the WC Act was enacted in 1952. Section 8, s 9 and the First Schedule of the Act were last amended by Amendment Act A947 which came into force from 1996. For the past seven years, no amendment had been made to take into account the yearly inflationary rate. In the light of this and, in the interest of justice, I do not think that this court should be bound by the compensation to be awarded under the WC Act, which is unrealistically low

and not appropriate for injuries caused in modern day industrial accidents. This is more so considering that the defendant did not insure the plaintiff as required by the Act and the plaintiff's claim in made under the CLA, and not under the WC Act.

GENERAL DAMAGES

Pain and suffering

[54] The undisputed specialist medical report of Dr Chee Chia Shing of Teo Orthopedic Clinic Sdn Bhd (CBOD Part A pp 11 and 12) states as follows:

> Mr. Alamgir had sustained severe trauma to his right upper limb as a result of the alleged industrial accident on 8.12.2011.
>
> His crush injury of right upper limb had healed with the following residual disabilities:-
>
> (1) Permanent loss of right upper limb due to amputation at the level of proximal third right humerus.
>
> (2) Total loss of function of his right upper limb due to the amputation.

Permanent disabilities

[55] 'The above stated disabilities resulted from the accident and *they are permanent disabilities*.' (Emphasis added.);

'He is not fit to resume his former job as a Factory worker due to his above residual disabilities.' (Emphasis added.)

[56] Based on the guidelines in the Compendium of Personal Injury Awards (2010) (as agreed upon between the Judiciary and the Bar Council) (see Circular No 258/2010 dated 26 October 2010) at pp 8 and 9 of the Compendium, the court agrees with the plaintiff's submission that an award of RM80,000 is fair and reasonable for the injury and disability suffered by the plaintiff.

Loss of earning and loss of earning capacity

[57] At the time of injury, the plaintiff was 27 years old, married and with one child. As a result of the injury, plaintiff cannot return to his original occupation due the amputation to his right arm.

[58] The plaintiff's loss of amenities, loss of earnings, and future loss of earnings are to be based on the following calculations:

(a) Multiplier

Section 28A(2)(d)(i) of the CLA provides:

> 28A (2)(d) in assessing damages for loss of future earnings the Court shall take into account that —
>
> (i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16;

The multiplier is 16 years of purchase.

16 x 12 months per year = 192 months;

(b) Multiplicand

the plaintiff's average salary (as pleaded and as evidenced by his payslips)	RM3,014.37
Less 1/3 deduction from RM3,014.37 for the plaintiff's own living expenses	RM1,004.79
Less current salary	RM 900
	RM 1,109.58;

(c) 192 months x RM1,109.58 = RM213,039.36;

100% liability

[59] On the basis of 100% liability, the claim to be allowed should be as follows:

(a) General damages

(i) Permanent disability pain and suffering	RM 80,000;
(ii) Loss of amenities, loss of earnings and loss of future earnings	RM213,039.36;

(b) Special damages

(i) Fees for expert medical report RM530.

50% liability

[60] In view of the 50% contributory negligence by the plaintiff, the sums to be awarded should be reduced by 50%.

DECISION

[61] Based on the above considerations, the court allows the plaintiff's claim in prayer 9 of the amended SOC as follows:

(a) General damages:

(i) Permanent disability and pain and suffering	RM40,000
(ii) Loss of amenities, loss of earnings and loss of future earnings	RM106,519.68

(b) Special damages RM 265.

(c) Interests at 5%pa from the date of filing of the writ of summons until the date of full realisation;

(d) Costs of RM20,000.

Claim allowed.

Reported by Afiq Mohamad Noor